87-1852

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

DO WARRANTLESS CANINE SEARCHES OF PRIVATE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS?

In the present case, police officers made a forced entry into petitioner's motel room without a warrant, searched the room, located a locked suitcase and subjected it to a canine search. Based upon the canine's positive response, a warrant was obtained. The locked suitcase was forced open and cocaine was discovered within.

The question presented for review is whether, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, police officers may bring a drug sniffing dog into private premises without a warrant and without consent in an attempt to obtain incriminating evidence therein.

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IN THE
SUPREME COURT OF THE UNITED STATES
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JOSE A. LOPEZ, JR.,
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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI
TO THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

The petitioner, Jose A. Lopez, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion of the First District Court of Appeal for the State of Florida entered in this action on February 19, 1988, rehearing denied March 28, 1988.

OPINION BELOW

The opinion of the First District Court of Appeal for the State of Florida is unreported and is attached hereto as Appendix A. The written opinion of the

trial court below is also unreported and is attached as Appendix C.

JURISDICTION

The opinion of the First District Court of Appeal for the State of Florida was entered on February 19, 1988. (See, Appendix A). A timely motion for rehearing and rehearing en banc was denied on March 28, 1988, and the order denying same is attached as Appendix B. Pursuant to Fla.R.App.P. 9.030(a)(2), attached as Appendix D, as construed by the Supreme Court of Florida there is no right of review to that Court where, as in this case, the court of appeal issues a per curiam affirmance. Davis v. Mandau, 410 So.2d 915 (Fla. 1981); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires enforcement of the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also requires application of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts of this case are unusual but not complex. On Monday, February 9, 1987,

in Jacksonville, Florida, members of the Jacksonville Sheriff's Office arrested an individual named Miguel Munoz for possession of cocaine, shortly after he attempted to sell it to the officers. Upon arresting Mr. Munoz, a search of his trousers revealed a slip of paper with the numbers "264-0511" and "154" written on it. Printed across the top of the paper were the words "Orange Park." Orange Park is a small suburban community located in a different county approximately 17 miles from Jacksonville, the scene of Mr. Munoz's arrest. After seeing the paper, one of the officers determined that the number "264-0511" was listed to the Scottish Inn Motel in Orange Park, Florida and the decision was made to drive to Orange Park and go to Room 154 of the Scottish Inn.

At approximately 4:30 p.m., the officers, now joined by members of the Orange Park Police Department met in front of the Scottish Inn Motel and devised a

plan to enter into Room 154. One of the officers requested to see the registration records for Room 154 and the desk clerk allowed him to do so. The records showed that Room 154 was rented to one Omar Simon, 1/ who was driving a 1983 Pontiac, Florida tag ZGA-94M. The officers obtained a pass key, and went to Room 154. No effort was made to secure a warrant.

Upon proceeding to the room, uniformed officers knocked on the door, so "if anybody opened the door inside, from outside, they would recognize them as being police." There is no evidence in the record that any of the officers announced their identity or purpose prior to their entry into the motel room.

1/ The record indicates that appellant used the names Jose Lopez and Omar Simon.

Petitioner opened the motel room door upon the officers knocking on it. Prior to the door being opened, the officers heard no noises from within the motel room, nor was there any delay in the opening of the door. Immediately upon the door being opened, two of the officers held their gun toward petitioner and told him to back up against the wall and at least five police officers entered the room.

Mr. Lopez was immediately searched by one officer, while other officers entered his room and checked to see if anyone else was within. A pistol, later determined to have been legally possessed by petitioner, was located. He was immediately arrested for possessing the firearm and was handcuffed. A locked suitcase was located in the bathtub and was seized by the officers and moved to the living area. At no time did petitioner consent to the seizure of the suitcase.

Not stopping to obtain a search warrant, a drug detection dog was brought into petitioner's room to sniff the suitcase. Although the record is not clear as to the amount of time which elapsed before the dog arrived, one officer testified that he was able to answer another call and return in time to witness the dog arrive. He estimated he was gone somewhat less than an hour.

The dog sniffed the suitcase and petitioner's vehicle located in the motel parking lot for the presence of drugs. During these searches, Mr. Lopez's suitcase was moved to the foot of the bed on the floor by the officers and the dog was walked around the room. The dog alerted positively to the suitcase. At this point in time, the decision was made to obtain a search warrant for the car and suitcase. The sole probable cause asserted in support of issuance of the search warrants for

these items was that the dog had alerted positively to the suitcase and vehicle.

Estimating the amount of time which elapsed before other officers returned with the search warrant, one officer stated, "After some while after that, seemed like a considerable amount of time, Porter and Clark [the officers] came back with a search warrant." (emphasis added).

Upon prying the locked suitcase open with a screwdriver, the officers discovered cocaine. In all, several hours elapsed from the time appellant's suitcase was seized until a warrant was obtained to search it.

Counsel for Mr. Lopez, pursuant to Fla. R. Crim. P. 3.190(h) filed a motion to suppress evidence seized from the vehicle and suitcase. After an evidentiary hearing, the trial judge suppressed all evidence seized from the vehicle, but refused to suppress fruits of the motel room search. The judge found the initial

entry to be lawful due to exigent circumstances, namely the presence of drugs within the motel room. He nonetheless was troubled that the canine search occurred without a warrant, stating in his written opinion:

> The question that has bothered the court throughout this is: Where did Luke come from? What right did the police have to bring a drug dog in a room they had no right to search but only a right to secure pending a search warrant?
>
> So the question is: Does the bringing of Luke into the room to see if there is contraband in that room constitute a search prior to issuance of the search warrant?
>
> . . . .
>
> The court can find no reason for the police bringing Luke to Room 154.
>
> . . . .
>
> ...[T]hey secured it [the motel room] for the purposes of searching and it seems to me that when they brought Luke into the room that they did search it.

(emphasis added).

Although he found the use of the dog "inappropriate," the judge concluded that

the subsequent search of the suitcase was lawful because it occurred after a search warrant was obtained.

The order denying petitioner's motion to suppress the contents of the suitcase was challenged by petitioner on appeal to the First District Court of Appeal for the State of Florida. Although this case was one of first impression for that court, it did not issue a written opinion, but instead issued a per curiam affirmance, a procedure typically utilized where the issue presented has previously been addressed and determined by prior case law. The lawfulness of the warrantless use of a canine search within the confines of one's residence has never previously been determined by any Florida court or by this Court.

Due to the broad impact of the per curiam affirmance, petitioner sought, but was denied, rehearing and rehearing en

banc. Petitioner now seeks review in this Court.

This petition squarely raises the issue of whether dogs trained to sniff contraband may be brought into an individual's private premises without a warrant so that police officers may obtain evidence in support of a warrant to further search those premises.

SUMMARY OF THE ARGUMENT

The decision below is in clear conflict with decisions from this Court as well as decisions from the Second and Ninth Circuits. The Second and Ninth Circuits have explicitly held that, within private premises, a canine sniff constitutes a search which, in the absence of a warrant, violates the Fourth Amendment. Other circuits have recognized a right of privacy for individuals occupying a motel room, as has this Court.

Significantly, in the present case the dog was not used outside the motel room to

detect cocaine within, but rather, was in a position to sniff petitioner's locked suitcase solely as the result of the warrantless and forced entry in petitioner's motel room. This conduct was in clear violation of this Court's decision in Payton v. New York, 445 U.S. 573 (1980).

In addition, the prolonged detention of petitioner's luggage prior to the issuance of a warrant to its search was unreasonable in light of this Court's decision in United States v. Place, 462 U.S. 696 (1983). The court's ruling below is in direct conflict with the Place decision.

Accordingly, this Court should accept jurisdiction in this cause in order to maintain uniformity with its previous decisions in Payton and Place, and to set reasonable guidelines for the use of canine searches within private premises.

ARGUMENT

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION AND THE DECISIONS OF NUMEROUS COURTS OF APPEAL.

The warrantless use of drug sniffing dogs is controversial. In the present case, this controversy raises an issue not yet determined by this Court, namely, whether police officers may make a forced and warrantless entry into private premises to subject articles within it to a warrantless canine search. All of the federal courts of appeal that have determined this issue have condemned such practice. This Court should accept jurisdiction of the present case to determine whether police officers must obtain a warrant to subject private premises to a canine search.

In United States v. Place, 462 U.S. 696 (1983), this Court approved the warrantless use of drug sniffing dogs to

sniff luggage "...located in a public place." Id. at 707 (emphasis added). In doing so this Court specifically held:

> The purpose of which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to a sniff test - no matter how brief - could not be justified on less than probable cause.

Id. at 706 (emphasis added). 2/

In Place, this Court went on to conclude that the ninety-minute detention of the defendant's luggage constituted a

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2/ See also, 1 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.2(f) (2d ed.) "It is extremely important to recognize that the Place holding does not validate the use of drug detection dogs in all circumstances...[I]f an encounter between the dog and a person or object is achieved by bringing the dog into an area entitled to Fourth Amendment protection, that entry is itself a search subject to constitutional restrictions."

seizure, which under the facts of that case, was not supported by probable cause, this Court noting, "There is no doubt that the agents made a 'seizure' of Place's luggage when, following his refusal to consent to a search, the agent told Place that he was going to a federal judge to secure issuance of a warrant." Id. at 707.

In the present case, following the forced and warrantless entry into petitioner's room at gunpoint, his room was searched and his luggage seized from the bathtub and removed to the living area. Only after this warrantless entry and seizure did the canine search occur. In all, several hours elapsed between the detention of petitioner and his luggage and the actual issuance of a search warrant for the suitcase. Thus, the decision below affirming the denial of petitioner's motion to suppress is in express and direct conflict with this Court's decision in Place because no warrant was obtained prior

to the seizure and detention of Mr. Lopez's suitcase.

The decision below is also directly contrary to the decisions in United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) and United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). In Thomas, a case directly on point, although somewhat less egregious because the detecting canine was located outside the apartment, the United States Court of Appeal for the Second Circuit held that, within private premises, a dog sniff constitutes a search which, in the absence of a warrant, violates the Fourth Amendment. In doing so, the Thomas court explicitly rejected the warrantless use of a canine to sniff the interior of an apartment. The Thomas court distinguished cases holding canine sniffs permissible in public airport surveillances. Specifically, it held:

> It is one thing to say that a sniff in an airport is not a search, but quite another to say

that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

. . . .

[A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, see, United States v. Place, 103 S.Ct. at 2644, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be sensed from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.

. . . .

Because of defendant Wheelings' heightened expectation of privacy

> inside his dwelling, the canine sniff at his door constituted a search. As the agent had no warrant, the search violated the Fourth Amendment. Hence, we conclude that the information gathered from the dog's alert may not properly be used to support the issuance of the search warrant of Wheelings' apartment.

Id. at 1366-1367 (emphasis added) (emphasis in original).

Similarly, in United States v. DiCesare, supra, a case directly contrary to the decision herein, the Ninth Circuit addressed the propriety of acquiring probable cause with a trained dog after seizure of private premises. In that case, the officers were admitted to defendant's apartment, secured the premises, and called for a narcotics canine. Id. at 898. The dog alerted to a suitcase in the living room and a search warrant was obtained based on that alert. Id.

The court held that the police did not have probable cause to obtain a search warrant, and could not use the dog to

obtain further evidence to establish probable cause for a warrant. Id. It further warned against dangers of unrestricted use of canine searches:

> If we upheld the admissibility of this evidence, we would encourage police to seize private dwellings without probable cause, then to bring in trained dogs to locate contraband in order to obtain the probable cause necessary for a warrant.

Id. at 899. The court concluded, "Officers cannot seize a dwelling to find probable cause -- first they must have probable cause to seize a dwelling." Id.

Concurring with the majority opinion, Circuit Judge Reinhardt expressed his concern over the growing trend of the warrantless use of canines within private residence:

> The question is-can we be forced to allow large police dogs to come into our homes and do whatever large police dogs do? The intrusion of these dogs is offensive to some, frightening to others, and, sadly, to at least a few, reminiscent of the ugliest types of scenes that have occurred in police states. It is

> hardly the sniff of a suitcase that is at issue. It is first and foremost the unwanted and unwelcome presence of an animal in the privacy of our homes, an animal intruder that our law enforcement authorities tell us is simply another government agent.
>
> . . . .
>
> History is replete with incidents in which dogs, acting as instruments of the state, have invaded people's rights in furtherance of the state's interest. In the antebellum South, dogs were used to ferret out blacks who sought little more than the same free society that the fourth amendment protects. During World War II, dogs were used in Nazi Germany to help locate Jews so that they could become a part of Hitler's 'Final Solution'. Although the state of affairs has changed somewhat since these events transpired, the image of the police state is as clear now as it was then. I cannot believe that, except in the most compelling and extraordinary circumstances, our free society would be willing to tolerate the forced entry of dogs into private homes for purposes of law enforcement-and certainly not in order to seek out contraband or fugitives.

Id. at 901-902.

The California courts have likewise resolved this issue in petitioner's favor.

See e.g., People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (Cal. 5th DCA 1977) (warrantless canine sniff of miniwarehouse compartments illegal). Indeed, counsel for petitioner has located not one case which has upheld the use of trained dogs to sniff private dwelling places in the absence of a search warrant. 3/ Sensory enhancement techniques that intrude into the privacy of the home, and by extension, into private motel rooms, have been consistently condemned as violative of the Fourth Amendment. United States v. Knotts, 460 U.S. 276 (1983). The ruling to the contrary in the instance case is in clear conflict with well-established authority.

3/ In fact, the very same court which issued a per curiam affirmance of the denial of petitioner's motion to suppress, recently issued a per curiam affirmance of the granting of a motion to suppress under identical facts. State v. Yollette Mira, ___ So.2d ___, App. No. 87-922 (Fla. 1st DCA April 20, 1988) (unpublished per curiam affirmance).

Of equal importance, the decision below conflicts with a long line of cases which prohibit police entry into private premises without warrant. Beginning with this Court's decision in Payton v. New York, 445 U.S. 573 (1980), the law has been clear that evidentiary items obtained as the result of an unlawful entry must be suppressed. Since Payton, and accordance with this Court's decisions in Hoffa v. United States, 385 U.S. 293, 301 (1966); Stoner v. California, 376 U.S. 483, 489-490 (1964); and Lanza v. New York, 370 U.S. 139, 143 (1962), numerous federal courts of appeal have applied this principle to situations where a warrantless entry is made into a lawfully occupied motel room. See e.g., United States v. Newbern, 731 F.2d 744 (11th Cir. 1984); United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983); and United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982).

The use of a drug sniffing canine in the present case was accomplished solely as the result of the warrantless and unlawful entry into petitioner's motel room. Without such entry, no canine sniff could have occurred. Accordingly, the canine sniff should have been suppressed as illegally tainted fruits of the warrantless entry. The decision below to the contrary is in direct conflict with the Payton decision and its progeny.

CONCLUSION

The opinion of the First District Court of Appeal below is in direct conflict with authority from this Court and also conflicts with decisions of federal circuit courts of appeal. The issue raised herein is one of great public importance. Petitioner respectfully prays this Court to accept jurisdiction in this cause and to reverse the decision of the court below to the extent it authorizes the warrantless entry into private premises for the purpose

of using a dog to sniff items within the premises.

Respectfully submitted,

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By: Elizabeth L. White
Elizabeth L. White

By: _____
Wm. J. Sheppard

Attorneys for Petitioner
Duval County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 5th day of May, 1988 by first class United States mail upon the following:

Robert A. Butterworth, Esq.
Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Fl. 32399-1050

Royall P. Terry, Jr., Esq.
Assistant Attorney General
Department of Legal Affairs
The Capitol
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Elizabeth L. White
ATTORNEY

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

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ATTORNEYS FOR PETITIONER

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IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

VICTOR TITTLE, a/k/a JOSE ANTHONY LOPEZ, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 87-799

Opinion filed February 19, 1988.

An Appeal from the Circuit Court for Clay County. Lamar Winegeart, Judge.

William J. Sheppard and Elizabeth L. White of Sheppard and White, Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General; Royall P. Terry, Jr., Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

SMITH, C.J., ERVIN AND NIMMONS, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6152

March 28, 1988

CASE NO: 87-00799
LT NO: 87-171-CF

Jose A. Lopez, Jr. vs State of Florida

Appellant/Petitioner Appellee/Respondent

ORDER

Motion for rehearing and rehearing en banc DENIED

By order of the Court

RAYMOND E. RHODES
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

cc:

William J. Sheppard Royall P. Terry, Jr.
Elizabeth Louise White

Deputy Clerk

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR CLAY COUNTY, FLORIDA

CASE NO.: 87-171 CF

STATE OF FLORIDA

vs.

VICTOR TITTLE, a/k/a
JOSE ANTHONY LOPEZ, JR.,

Defendant.

O R D E R

THIS CAUSE came on to be heard upon the Defendant's Motion to Suppress statements and evidence found in Room 154 of the Scottish Inn, Orange Park, Florida, and the Court having heard testimony and argument of counsel, finds as follows:

The Jacksonville Sheriff's Office Strategic Investigation Section, whose nickname I suppose would be "The Big Time Drug Squad," is composed primarily of police officers and some other persons who usually work in drug dealings. Said investigative section had been working to

set up a buy from a man named Munoz. The buy was to go down at the Ramada Inn located at the intersection of I-295 and Lane Avenue, in the City of Jacksonville.

Officer Porter, who was the Affiant in the Affidavit and principal witness for the State at the hearing, was assigned to work with the officers who had set up the buy in Jacksonville at the Ramada Inn. His function was to observe the person who would come to that Ramada Inn and attempt to follow him and to protect his fellow officers. They were in communication by radio.

Pursuant to that, he took up a position where he could observe the entrance of that Ramada Inn and Munoz showed up and met the officers inside the Ramada Inn.

When he exited, Investigator Porter, as was his job, attempted to follow this suspect.

He followed him down Interstate 295 in a southerly direction until he got to the intersection of U.S. 17, which is just inside Clay County, Florida. When you exit, you're in Clay County, I'll put it that way.

Officer Porter, I guess the best way to describe it, was performing a very loose surveillance of that car and lost him at that intersection.

He testified that for several minutes he looked around the intersection which contained several motels and he named the ones he looked at. He did not see the car he had been following. Therefore, he re-entered I-295 heading in a northerly direction and was returning to the Ramada Inn at the intersection of I-295 and Lane Avenue, in the City of Jacksonville, Duval County, Florida.

While proceeding to do that, he again came upon the vehicle he had followed in a

southerly direction on I-295, losing it at the intersection I-295 and U.S. 17.

He proceeded again to follow that car to the Ramada Inn where he saw the occupant of that car exit the vehicle with, I believe his description was, a short jacket or something, and placing something in it and holding it at the bottom, going to the Ramada Inn.

Subsequently, by radio, he learned that the officers in the Ramada Inn had taken down the person who he followed (by taking down, I mean, arrested) and recovered from him one kilo of cocaine and a pistol.

The officer who had been dealing with the suspect they now had under arrest informed Officer Porter that it was an eight kilo deal and that this first kilo was a test run and the others would be delivered not in bulk but two at a time by this same Munoz who he had followed.

Upon searching Munoz at his arrest, they found a slip of paper that contained an obvious telephone number by the number of digits, and the numbers "154" with no other notation on that slip of paper.

By calling the number that was an obvious telephone number, the officers established that it was the telephone number of the Scottish Inn located at Orange Park, Clay County, Florida, at the intersection of I-295 and U.S. 17.

Detective Porter testified he then assumed the "154" was a room number at that motel. He proceeded to Clay County after asking his Com Room to have the Orange Park police officers meet him at the City Limits. I think they met at the Omelet House or some place in the same vicinity of the Scottish Inn, and Detective Porter advised them of the above facts and asked them to assist him in furthering the police work.

In furtherance of that, they contacted the registration desk of the motel and found that Room 154 was occupied as shown by the registration form, which is Defendant's Exhibit 1, by one Omar Simon with a Homestead, Florida, address. Officer Porter testified he believed that the motor vehicle license number to be the same as the motor vehicle license number that he had been following.

Upon securing the services of two uniformed policemen, the entourage proceeded to Room 154 of the Scottish Inn Motel where the defendant in this case was registered under the name of Omar Simon. It has now been established that the defendant's true name is Victor Tittle.

The officers then arrested the defendant for Carrying a Concealed Firearm when they found a gun contained in an ankle holster the defendant was wearing. It is agreed that this charge would not be a sustainable arrest, but the officers did

advise the defendant of his Miranda rights at the time the arrest was made.

At that point in time, they testified they began to look for an Assistant State Attorney to obtain a search warrant. They did continue on after other officers arrived, one of whom brought the drug dog, Luke, with him. Officer Porter testified that he was present at the time Luke arrived.

The court subsequently issued a search warrant that allowed police to search room 154 entirely and did not delineate the suitcase as an item to be searched, but delineated the room, and the goods to be found, or what they were allowed to search for and seize, was cocaine.

The court finds that Officer Porter knew at the time he left the Ramada Inn in Jacksonville, Florida, the second time, that is after the first bust had gone down, the recovery of the paper and all, that at that point in time, Officer Porter had

probable cause to obtain a search warrant for room 154, provided it was occupied.

Having said that, the question is: Did Officer Porter have such exigent circumstances to secure that room until such time as a search warrant could be obtained?

From the totality of his knowledge, that is: One: It was an eight kilo drug deal; and, Two: From Officer Porter's experience, it was indicated they were knowledgeable drug dealers from the method and sophistication of the transfer of the kilo for the cash. By setting up the deal in that method and manner, the remaining contraband could either be destroyed or flight could occur if a certain time lapse was greater than expected.

Counsel argues you can't destroy seven kilos of cocaine, but I can't understand why you can't. It's a powder and flushes down the toilet.

From Officer Porter's experience at that point in time and with what he knew, the court finds he did have exigent circumstances to secure room 154 at the Scottish Inn, Orange Park, Florida.

The defendant was given his Miranda warnings upon entrance to the room.

Although the arrest was not a legal arrest, the police would have been required to give the defendant his Miranda warnings without an arrest. Miranda warnings having been given, the defendant having subsequently made statements without request of counsel, and the court finding the police had the right to enter the room, there would be no basis to suppress those statements made by the defendant to the police at that time.

Now, the point that concerns the court more than that is the point raised by counsel of whether the warrant itself should have been limited to the suitcase and whether it was improper to consider the

alert of Luke on the suitcase in issuing the search warrant.

The question that has bothered the court throughout this is: Where did Luke come from? What right did the police have to bring a drug dog in a room they had no right to search but only a right to secure pending a search warrant?

So the question is: Does the bringing of Luke into the room to see if there is contraband in that room constitute a search prior to issuance of the search warrant?

And, secondly, was the magistrate in error in issuing the warrant for the entire room; and, if they had that right, was the magistrate in error in issuing the warrant for room 154, Scottish Inn, rather than the suitcase that had been alerted to by Luke in room 154?

The court can find no reason for the police bringing Luke to room 154.

I think the police in this case had done an excellent piece of police work and

the way the thing went down, I think they had every right to secure the room. In fact, they would have been derelict in not securing it. But, they secured it for the purposes of searching and it seems to me that when they brought Luke into the room that they did search it.

Now, they did not search the suitcase until after the issuance of the warrant. So the court finds that although the police inappropriately brought the dog, Luke, in to assist them, once the dog alerted, they did not search, and the court further finds that the search warrant then having been issued for room 154 would encompass the suitcase as it was. The warrant was restricted to search for cocaine, no other drugs. Nothing else. Just cocaine.

Therefore, it is

ORDERED that Defendant's Motion to Suppress the seven kilos of cocaine and statements made by the defendant after the Miranda warnings is hereby denied.

Green Cove Springs, Florida. July 8, 1987.

LAMAR WINEGEART, JR.
CIRCUIT JUDGE

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FLORIDA RULE OF APPELLATE PROCEDURE
9.030(a)(2)

Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of districts courts of appeal that:

(i) expressly declare valid a a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decision of other district courts of appeal.